DATE: August 1, 1996

CASE NO: 94-INA-535

In the Matter of:

NEW JERSEY FIRST METHODIST CHURCH,
Employer,

On Behalf of:

SUNG HYE PARK,
Alien

Appearance: Carol Wolfenson, Esquire
New York, NY
for the Employer and the Alien

Before: Huddleston, Vittone, and Wood
Administrative Law Judges

PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Sung Hye Park ("Alien") filed by Employer New Jersey First Methodist Church ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, New York City, denied the application and the Employer and the Alien requested review pursuant to 20 C.F.R. § 656.26.

Under Section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under

prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On August 26, 1991, and as amended, on August 10, 1992, Employer filed an application for labor certification to enable the Alien to fill the position of "Teacher-Bi-Lingual, Korean/English." There was no experience required, but fluency in Korean and English and a Bachelors Degree in Theology (amended to include Christian Education) were required. The job offered was described as:

> To teach children, teens and adults in after school and week-end program at Methodist Church to speak, read and write in the English language (for recent immigrants) and to teach the Korean language to children brought up in the U.S.; to prepare lessons, give oral and written presentations, give assignments and test achiev[e]ment; to teach bible study and theology classes to children and youth groups.

(AF 4). The application indicated that the Alien had a Bachelors degree with Social Science as the field of study and (as amended) a Masters Degree in Divinity with Theology as the field of study. (AF 2). An April 1, 1992 letter from the Employer's Pastor explained how the Alien met the educational requirements, the need for the combination of duties, and the basis for the language requirement. (AF 9). A followup letter dated May 11, 1992 from the seminary that the Alien attended explained that by August 1991 she had competed work more than equivalent to a Bachelor's degree with a major in Theology. (AF 21).

A recruitment report from the state agency indicated that there were four applicants referred for the position, all of whom were rejected, but the state agency questioned the validity of their rejection. (AF 68-69).

On December 21, 1993, the CO issued a Notice of Findings in which she notified the Employer of the Department of Labor's intention to deny the application on several bases. One of the deficiencies was that the Employer needed to further document the basis for rejecting one of the U.S. applicants, Iong C. Jang, as he appeared to be qualified (citing 20 C.F.R. §§ 656.20(c)(8), 656.21(b)(6), (j), and 656.24(b)(2)(ii)). (AF 70-74).

The Employer submitted its rebuttal on January 21, 1994 through the letter of its attorney and a letter (with

attachments) from Reverend Chang Seung-Woong on behalf of the Employer. (AF 75-96).

On February 25, 1994, the CO issued a Final Determination in which she accepted the Employer's rebuttal on some of the issues but stated that the Employer had not adequately documented that U.S. applicant Jang was rejected for lawful, job-related reasons. (AF 97-100).

The Employer and the Alien, through their attorney, requested review of that denial on March 31, 1994, and asked that the appeal first be considered as a Motion to Reconsider. (AF 101-129). The reconsideration motion was denied by the CO on June 10, 1994. (AF 130).

DISCUSSION

As a preliminary matter, we will not consider documentation submitted by the Employer in connection with the request for review, although the arguments made have been considered. Our review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. § 656.27(c). ***See also*** 20 C.F.R. § 656.26(b)(4). Here, the Employer has failed to assert a basis for not having submitted the subject documentation as part of its rebuttal and it should not be considered now. ***See Sharp Screen Supply, Inc.,*** 94-INA-214 (May 25, 1995); ***ST Systems, Inc.,*** 92-INA-279 (Sept. 2, 1993); ***Schroeder Brothers Co.,*** 91-INA-324 (Aug. 26, 1992); ***Kem Medical Products Corp.,*** 91-INA-196 (June 30, 1992).

Section 656.21(b)(6)[1] provides that if U.S. applicants have applied for the job opening, the employer must document that such applicants were rejected solely for job-related reasons; section 656.20(c)(8) provides that the application must show the job opportunity has been and is open to any qualified U.S. worker; and section 656.21(j) requires the employer to provide the local office with a written report of the results of the employer's post-application recruitment efforts. Under section 656.24(b)(2)(ii), the CO's determination whether to grant labor certification is made on the basis of whether there is a U.S. worker who is able, willing, qualified, and available for the job opportunity; such worker will be considered able and qualified if "by education, training, experience, or a combination thereof, [the worker] is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed."

[1] All section references are to title 20 of the Code of Federal Regulations.

In general, an applicant is considered qualified for the job if he or she meets the minimum requirements specified by an employer's application for labor certification. ***The Worcester Co, Inc.,*** 93-INA-270 (Dec. 2, 1994); ***First Michigan Bank Corp.,*** 92-INA-256 (July 28, 1994). However, an employer may reject an applicant who meets the stated requirements but is nevertheless demonstrably incompetent to perform the main duties of the job, based upon information obtained from references or objective testing during the interview. ***First Michigan Bank Corp., supra.***

Where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, even if it does not state that he or she meets all the job requirements, an employer should further investigate the applicant's credentials by an interview or otherwise. ***See Dearborn Public Schools,*** 91-INA-222 (Dec. 7, 1993) (***en banc***); ***Gorchev & Gorchev Graphic Design,*** 89-INA-118 (Nov. 29, 1990) (***en banc***). Unsuccessful attempts at telephone contact, without more, are insufficient to establish a good faith effort to recruit. ***See, e.g., Gilliar Pharmacy,*** 92-INA-3 (June 30, 1993). The employer is under an obligation to attempt alternative means of contact when initial means are unsuccessful. ***Yaron Development Co.,*** 89-INA-178 (April 19, 1991) (***en banc***).

Here, applicant Jang, a resident alien, appears to be ostensibly qualified, as he is a graduate of the Chung Ang Theological Seminary, has taught English, and is qualified by examination as a bilingual teacher (in Social Studies), according to his resume. (AF 58-61). When questioned by the job service, Mr. Jang denied having been interviewed by the Employer either by phone or in person but admitted that he had returned to Korea in 1982, as well as in 1979. (AF 63).

The Employer asserted the following basis for rejecting Mr. Jang (appearing at AF 62):

> We called Mr. Jang on the telephone. In the interview, he said that he got his green card by General Amnesty. Since Amnesty was a program for people in the U.S. continuously since before 1982, we questioned Mr. Jang about where he worked from 1984 to 1989. He told us that he worked for Dong Kuk University in Korea. This confirmed what he had put on his resume. Since we assume that Mr. Jang did not lie to the U.S. government to get his green card, then he had to be in the U.S. from 1981-1989, and then his resume is a complete lie.
>
> The job for a bi-lingual teacher we are offering includes teaching of Bible studies and theology to children and youth groups. We would certainly not consider a person who lied in this manner to teach our

> children any subject, and especially not morals, ethics and religious studies.

The Notice of Findings found these conclusions by the Employer to be unclear as well as "based on emotional and inclusive (***sic***) assumptions", and noted that applicant Jang denied having been interviewed. (AF 71). In its rebuttal, appearing at AF 86, the Employer elaborated further:

> I reviewed the resume of Mr. Jang. The school in Korea he said he graduated from is an unaccredited school, not authorized by the Ministry of Education in Korea. This would not be the equivalent of a U.S. Bachelors degree in Theology or Christian Education and he would not be qualified for the position.
>
> To clarify my letter concerning Mr. Jang's green card. . . He stated in a telephone interview that he obtained his green card through Amnesty. I did not question him about that subject but showed the copy of the green card to the attorney, Carol Wolfenson. . . She advised me that the A90 number on the green card was from Amnesty, and that meant that he had to be illegal in the U.S. from before January 1, 1982 and resided in the U.S. continuously until 1987. His resume showed he was working in Korea at Dong Kuk University. Either he lied to obtain his green card by stating he lived in the U.S. from 1982-1987 or he lied on his resume by stating he worked at the university from 1984-1989. We would not hire a person who is dishonest to teach our children. You now say that Mr. Jang denies being contacted.

(AF 86, 89).

The CO found the Employer's rebuttal to be inadequate because the Employer did not discuss its concerns with Mr. Jang or document that he was not qualified. (AF 97).

In the Employer's appeal brief, the Employer argues that applicant Jang was interviewed by telephone and it was unnecessary for the pastor to embarrass the applicant and question him further once he discovered that either the resume was wrong or the applicant did not qualify for a green card. (AF 124). The Employer also notes, citing ***Matter of Dove Homes,*** 87-INA-680 (May 25, 1988), that the CO erred in giving greater weight to the applicant's account. (AF 123).

While the Employer has made some good points in its brief, the problem with this case is that even accepting the Employer's account, its pastor's contact with applicant Jang was perfunctory and he did not give the applicant any opportunity to explain

discrepancies between his work history and his green card application. The portion of the Act (section 245A[2], 8 U.S.C. § 1255a(a),(b)) upon which the Employer relies to establish that the applicant was dishonest recognizes that an alien may establish "continuous physical presence" in the United States notwithstanding "brief, casual, and innocent absences." (AF 109). The applicant's handwritten resume and his supporting documents are simply too ambiguous for the conclusion to be reached that he has essentially committed fraud without his being given the opportunity to explain. Furthermore, the Employer's assertion that the applicant's educational background is inadequate, because his school was unaccredited, is based on speculation and innuendo and is unsupported by any documentation. Moreover, the applicant was given no opportunity to either show the school he attended was accredited or explain why his educational background was nevertheless adequate. Accordingly, the Employer has failed to establish a basis for not inquiring further into applicant Jang's qualifications, by a complete interview, rather than by a few questions over the telephone.

In view of the above, the application should be denied for failure to establish a good faith effort to recruit.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

_____
PAMELA LAKES WOOD
Administrative Law Judge

[2] The section was added by Public Law 99-603, 100 Stat. 3394 (Nov. 6, 1986).

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: New Jersey First Methodist Church
(Alien: Sung Hye Park)

Case No. : 94-INA-535

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Vittone			
Huddleston			

Thank you,

Judge Wood

Date: